

U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036



DATE: AUG 29 1988
CASE NO. 87-INA-580

IN THE MATTER OF

LA SALSA, INC.,
Employer

on behalf of

MAHROKH SEDAGHATIAN,
Alien

Edith Engel Ford, Esq.
Los Angeles, CA
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, DeGregorio, Fath,
Levin and Tureck, Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (hereinafter "the Act"). The Employer requested review from U.S. Department of Labor Certifying Officer Paul R. Nelson's denial of a labor certification application pursuant to 20 C.F.R. §656.26.¹

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

¹ All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of §656.21 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means, in order to make a good faith test of U.S. worker availability.

This review of the denial of a labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties [see §656.27(c)].

Statement of the Case

The employer, a fast food restaurant chain, filed an application for alien employment certification to enable the Alien to work as a full charge bookkeeper. The job duties included but were not limited to² keeping a complete set of records of financial transactions, entering details of transactions in account and cash journals, balancing books, compiling reports to show statistics, and completing books through trial balance. To qualify for the position, the Employer required two years of experience in the job offered.

The Certifying Officer ("CO") issued a Notice of Findings ("NOF") on November 20, 1986 (AF 14-16). Labor certification was denied for several reasons. First, the CO found that employer's initial contacts with the job applicants occurred on May 6 [1986], that two of the four applicants were no longer available, and that this was not a good-faith effort at recruitment. Second, he found that "[t]he balance books and compile records and trial balances requirements appear unduly restrictive . . ." (AF 15), adding that "employer wants an Accountant for Bookkeeper pay." (*Id.*). Third, he found that U.S. workers were rejected for other than lawful, job-related reasons. Specifically, he found that Peggy Esterly, who had been a bookkeeper for five years, was contacted by Employer only for the purpose of being told "the position had been filled" (AF 16); that Sintell Ammons, a bookkeeper with two years experience, did not appear at an interview because employer waited too long to contact her; and that John Kwon was rejected

because at interview "applicant showed no knowledge of general ledger and payroll taxes". This requirement has been found restrictive elsewhere in this Notice.

(*Id.*).³

² The list of job duties on the ETA Form 750 was followed by "etc." See AF 19.

³ A fourth applicant, Edith Rivero, also was held to have been rejected for other than lawful, job - related reasons in the NOF. But the Final Determination did not mention this applicant, and it is therefore assumed that Employer's rebuttal of the NOF in regard to this applicant was accepted by the CO.

In a rebuttal filed on December 8, 1986, Employer first noted that it did not engage in undue delay in contacting the applicants. Employer pointed out that the California Employment Development Department ("EDD"), with whom the job applications initially were filed, did not mail them to Employer until April 18, 1986, and Employer did not receive them until about April 20. Further, although Employer did not send letters to the applicants until May 5, 1986 (see AF 25-27), Employer stated that it attempted to contact the applicants by telephone before that date (AF 8). Finally, Employer stated that it contacted, and scheduled interviews with, three of the four applicants referred to it by EDD in response to its advertisements, although one applicant -- Ms. Ammons -- failed to show up (id.). Thus, Employer argued that it initiated telephone contact with the applicants soon after receiving their responses to the advertisements, sent letters to the applicants only a short time later, and successfully contacted three of the four.

Second, Employer noted that the CO was incorrect in his understanding of the duties of a bookkeeper. It pointed out that, according to the Dictionary of Occupational Titles, the duties of a bookkeeper are as follows:

Keeps complete set of records of financial transactions of establishment. Verifies and enters details of transactions as they occur or in chronological order in account and cash journals from items, such as sales slips, invoices, check stubs, inventory records, and requisitions. Summarizes details on separate ledgers, using adding or calculating machine, and transfers data to general ledger. Balances books and compiles reports to show statistics, such as cash receipts and expenditures, accounts payable and receivable, profit and loss, and other items pertinent to operation of business. Calculates employee wages from plant records or timecards and prepares checks or withdraws cash from bank for payment of wages. May prepare withholding, Social Security, and other tax reports. May compute, type, and mail monthly statements to customers. May complete books to or through trial balance. May operate bookkeeping machines

[D.O.T. 210.382-014 BOOKKEEPER (clerical) I full-charge bookkeeper; general bookkeeper (emphasis added)]. Therefore, Employer contended that its requirements for the position were not unduly restrictive.

Third, Employer contended that no U.S. workers were rejected for other than lawful, job - related reasons. Ms. Ammons did not show up for a scheduled interview (AF 22); Ms. Esterly could not be reached by telephone and did not respond to a letter requesting her to schedule an interview (AF 8, 25); and, after an interview, Mr. Kwon was found to be unqualified (AF 24).

The CO issued a terse Final Determination denying certification on February 20, 1987. He affirmed his earlier finding that Employer was guilty of undue delay, again noting that two of four qualified applicants were no longer available by the time Employer contacted them. He also found fault with the five weeks that elapsed from the time the advertisement ran until initial contact with the applicants, finding that using letters as the only means of contacting applicants was not indicative of a good faith recruitment effort. In addition, although Employer set up an

interview with Ms. Ammons, the CO nonetheless found that this did not excuse Employer's delay in waiting an unreasonable time to contact her.

The CO apparently conceded that Employer was correct that the job requirements listed on the Form 750 were appropriate for a bookkeeper, since this finding from the NOF was not repeated in the Final Determination.

Finally, the CO again found that applicants Esterly and Kwon were unlawfully rejected. He found that

Employer submits no evidence Esterly is "mistaken" [that her only contact with Employer was to be told the job was filled]; . . . Employer's citing of general ledger and payroll taxes in rejecting KWON has no basis in ETA 750A form as requirements for the job

DISCUSSION

Both the Notice of Findings and Final Determination contain significant errors regarding each finding made by the CO.

First, we hold that Employer did not unduly delay in contacting the four job applicants referred to it by EDD. The CO's statement that five weeks elapsed from the time the advertisements ran until Employer contacted the applicants is irrelevant since, as the CO admits, EDD did not refer the applications to Employer until April 18, almost three weeks after the advertisements ran; and Employer's statement that it did not receive the applications until about April 20 is consistent with the April 18 date of referral. Likewise, that one of the applicants did not show up for a scheduled interview cannot be blamed on Employer or found to be proof of bad faith on Employer's part.

At the latest, Employer sent letters to the applicants two weeks after it received their responses to the advertisements. Moreover, although the CO found that Employer used only one means of contact (letter), there is no reason in this record to doubt Employer's statement that it tried to contact the applicants by telephone prior to sending them letters. In addition, three of the four applicants were contacted by Employer and scheduled for interviews, not two of four as the CO twice stated, which is persuasive evidence that no undue delay occurred.

Finally, the CO's analysis of the evidence regarding Employer's attempts to contact one of the applicants, Ms. Esterly, bears special mention. Based on a four - word response to a questionnaire sent to Ms. Esterly five months after the events in question took place, the CO found that Employer's only contact with Ms. Esterly was to inform her by letter that the job had been filled. In contrast, Employer stated, in a letter written to its attorney on May 12, 1986 (AF 22), the day it completed its recruitment efforts, that it "[c]ould not reach [Peggy Esterly] by phone, so sent letter, received no reply." To support the accuracy of this statement, Employer enclosed copies of the letters it sent to three of the applicants on May 5, 1986, requesting that they schedule appointments for interviews (see AF 25-27). One of these letters was addressed to

Ms. Esterly (AF 25). Finally, in its rebuttal to the NOF, Employer reiterated that it first tried to reach Ms. Esterly by telephone; when that failed, the May 5, 1986 letter was sent (see AF 8). Employer then noted that Ms. Esterly's questionnaire response must have been in error, pointing out that the May 5 letter was the only letter it sent to her.

In light of this analysis of the evidence, the CO's finding that ""Employer submits no evidence Esterly is 'mistaken"D" cannot be explained. Moreover, based on this record, a finding that Ms. Esterly's brief response to the questionnaire is more credible than the Employer's evidence on this issue would be unsupportable under any standard of review. Employer clearly acted reasonably in its efforts to follow up Ms. Esterly's application, and has established that she was unavailable for the job.

Second, although the CO apparently conceded the errors in the NOF in regard to the job duties of a bookkeeper vis-a-vis those of an accountant, no longer raising this issue in the Final Determination, this point nonetheless remains relevant to our decision. For one thing, the DOT definition of a bookkeeper cited by Employer in its rebuttal is relevant to our discussion of the Employer's determination that Mr. Kwon was unqualified for the position (see infra). Additionally, the CO's discussion of this issue in the NOF, in which he questioned Employer's integrity in recruiting for this position without bothering to make a routine check of the DOT to determine the job duties of the position, raises concerns regarding the CO's handling of this certification application. The Certifying Officer appears to have acted as though he was Employer's adversary rather than an impartial adjudicator of the certification application. This Board will not stand idly by in such cases.

Finally, having found earlier in this decision that Ms. Esterly was unavailable for the position, the only remaining issue is Employer's determination that Mr. Kwon was unqualified. The CO found that Employer's reasons for finding Mr. Kwon to be unqualified -- that he did not have experience with the general ledger and payroll taxes -- were not job requirements listed on the Form 750 (AF 7). But Employer, in discussing Mr. Kwon, did not limit his deficiencies to the two job duties listed by the CO in the Final Determination. Employer listed one specific job duty which he could not perform -- completing a set of books through trial balance (see AF 24) -- which is one of the job duties specifically listed on the Form 750 (see AF 19). Further, it is apparent that Employer was contending that Mr. Kwon's experience was not as a bookkeeper, but rather as a budget planner, and therefore he was not qualified to work as a bookkeeper (see AF 22, 24). The specific duties that Employer said he could not perform appear to be more as examples than as a definitive list.

Therefore, the CO erred in finding that the job duties Mr. Kwon allegedly could not perform were not listed on the Form 750; in fact, one of these duties was specifically listed there. Moreover, Employer's overall contention was that Mr. Kwon was not generally capable of working as a bookkeeper in any event. Employer's rejection of Mr. Kwon due to his inability to perform both the specific job duty listed on the Form 750 and the job of bookkeeper in general was reasonable and in accordance with §656.21(b)(1)(i)(E) and (b)(7) of the regulations.

Since all of the reasons given by the CO for rejecting certification were erroneous, and the evidence establishes that no U.S. workers are available for the position, the CO is reversed, and certification is granted.

ORDER

The Certifying Officer's denial of alien labor certification is reversed, and certification is granted.

JEFFREY TURECK
Administrative Law Judge

JT/jb

Administrative Law Judges Fath and Levin dissenting:

I would feel remiss if I were to stand idly by while the Board once again criticizes the Certifying Officer for doing his job. See Phototake, 87 INA 667 (July 20, 1988). He is stating, however inarticulately, that the employer has not persuaded him that there are not U.S. Workers qualified, willing and able to take the employer's job. He is saying that there were at least two qualified applicants for the job by training and experience: both had training in accounting and both had worked at the job. Moreover, he is saying that the employer's self-serving statements that the applicants are not qualified are contradicted by the applicants' resumes. His tilt toward skepticism is encouraged by the employer's failure to contact Esterley, the most qualified and the most likely applicant for the job, and the statement from that applicant that the employer wrote her only to tell her the job had been filled. Though advised of this objection in the notice of findings, the employer made no attempt to corroborate its denial through Esterley.

Like me, the Certifying Officer may have been influenced by common sense. Bookkeepers as distinguished from accountants are not necessarily highly trained. The ability to keep a set of books to the extent required by the employer is the lowest level of achievement for most high school courses. Qualified bookkeepers should be available in great numbers. (It would seem that the alien with a BS in accounting is over qualified for the job.) The job was originally offered at a salary of \$7.70, which may be presumed to be the alien's wage, instead of \$10.26, the prevailing wage. The employer's inability to find a qualified U.S. worker as bookkeeper in a population of roughly three million people (Los Angeles) is inconceivable.

Given these considerations, I am inclined to ask: Is there a bona fide offer of a job? Has the employer been undercutting the prevailing wage for U.S. workers by employing the alien for two years before filing the application? Is there a qualified, willing and able U.S. worker available to take this job? Is a grant of labor certification under the circumstances of this case warranted where the intent of the statute and regulations is the protection of the U.S. worker?

The Certifying Officer is not bound to accept the employer's assertions as true, but he must consider them and give them the weight they deserve. GENCORP, 87 INA 659, (January 13, 1988). The Certifying Officer judged the credibility of the employer from a perspective that included the questionable background of the case, and direct dealing with the parties. As befits his position as a factfinder, he found the employer wanting. He performed his duty under GENCORP, whereas the Board rejected the principle it laid down in that case and accepted the employer's proffer as truth.

No less than the Certifying Officer, the Board, acting on behalf of the Secretary, must be satisfied, based on the evidence, that there are no qualified U.S. workers to take the job offered by the employer. I cannot make that judgment on this record, and so would remand the case for additional fact finding to the end that it can be readily determined whether there are qualified, willing and able U.S. workers for a bona fide job.

GEORGE A. FATH
Administrative Law Judge

I concur.

STUART A. LEVIN
Administrative Law Judge